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A SECOND CHAMBER FOR THE SCOTTISH PARLIAMENT?

Hector L MacQueen*

This paper is a revised and updated version of an earlier one¹ prompted by an interview with the then Presiding Officer of the Scottish Parliament, Sir David Steel (now Lord Steel of Aikwood), published in *The Scotsman* on Boxing Day 2002. Sir David indicated that he had, “in the light of experience”, come to favour having a form of second chamber in the Scottish Parliament. He was quoted as follows:

“There is an argument for saying, should we have further revision [of legislation]. I personally was always against having a second chamber simply because that would be adding more bureaucracy and expense to the political process and I was not sure that was necessary. But you could have a part-time, small second chamber rather like the House of Lords, an appointed body, not an elected body, to which bills could be referred and they could have a capacity that the House of Lords has to refer them back. ... During the passage of the Scotland Act, in fact, I took part in the debates in the Lords and I was very strongly against the amendments to create a second chamber. But I think it would be possible to run one on quite a cost-effective basis, using the same premises, perhaps appointed rather like the new life peers have been, by an appointments committee and people willing to give up time from various areas of life with that sole purpose of reviewing legislation. ... [O]bviously the whole structure of the thing may come under review, not though, in the lifetime of the next Parliament but probably the one after that. It was Donald Dewar who said devolution was a process, not an event, and I think that’s right. But I don’t think there is any urgency about it ...”

A month or so later Sir David denied that he was proposing a Scottish version of the House of Lords, but thought rather that a special review group might be set up to examine Scottish Parliament legislation once it had been in existence for a decade.² He elaborated upon this in his Donald Dewar Lecture in August 2003, when he said:

“... [W]e could do with some 'revising' mechanism for legislation. I have mentioned this in passing before and been caricatured for my pains as proposing to establish a Scottish House of Lords, which I emphatically do not. Some have argued that our unicameral Parliament is flawed and that it ought to be bicameral to provide a check and balance as the House of Lords does at Westminster. I have never agreed with that proposition, and I do not detect a thirst among the population for yet more politicians and elections. But I do recognise that the total absence of any check could present problems. ...

After a bill is passed by the Parliament we have to wait for a month while the UK law officers certify that it has not fallen foul of either the Scotland Act or the European Convention on Human Rights. ... Only then

* Scottish Law Commissioner; Professor of Private Law, University of Edinburgh. The views expressed in this paper are entirely personal and in no way to be taken as representing, in particular, the views of the Scottish Law Commission. The author is however grateful for many helpful discussions with friends and colleagues over the years since devolution. All URLs cited last checked 21 July 2015.

¹ Hector L MacQueen, ‘The case for a second chamber’, in Bill Jamieson (ed), *What Future for Scotland? Policy Options for Devolution* (Edinburgh: Policy Institute, 2003), 47-61.

² *Times*, 30 January 2003.

does the Presiding Officer write to the Queen asking her to give her royal assent, at which point it becomes an Act and passes into the law of the land. All I am suggesting is that, during that same month, bills could be referred to an appointed committee of a couple of dozen people.

Their task should be to pick up any perceived defects or widespread objections. They should have the capacity neither to oppose nor alter what the elected Parliament has done, but merely to refer a bill or part of it back for a further examination by the Parliament. ...

They could meet in one of the of the committee rooms at minimal public expense. Whether they are called the Revising Committee or constitute a revival of the Scottish Privy Council, abolished at the time of the Union, is unimportant. They should be men and women independent of the political parties (though some could perhaps be suggested by them) and represent a broad spectrum of Scottish civic life, perhaps replacing the now rather aimless Civic Forum. The Prime Minister's proposed Appointments Commission could make the necessary selection.”³

There, however, the debate seemed subsequently to rest, not helped by the ignominious failures at Westminster during the intervening years to reform the House of Lords as a second chamber.⁴ But now the question of a second chamber for the Scottish Parliament has surfaced again, the context being the absolute majority which the SNP won in the elections of May 2011 and the way in which that majority has been used since. This has not been so much in the substance of the legislation passed and policies pursued (although obviously there might well be political disagreement about these), but rather in the appointment in all the main committees of the Scottish Parliament of SNP conveners and a majority of SNP members. Insofar as the committees are supposed to fulfil one of the functions of a second chamber by providing protection from the potential for a ‘tyranny of the majority’,⁵ there clearly is a problem in the present situation. That may of course be resolved for the moment in the event of the next Scottish Parliamentary election leading to the renaissance of the coalition government for which the institution was designed. But the outcome of the United Kingdom General Election in May 2015, when 56 of the 59 Scottish seats were taken by the SNP, does not suggest that such a renaissance is at all probable. Certainly the state of the parties that is the necessary pre-condition of coalition cannot be taken for granted at the next or any subsequent Scottish election. Further, even if it occurs, coalitions will not prevent repeat performances with regard to committee convener-ships and membership from governments so formed. A longer-term view is clearly needed.

³ The lecture text is available at <http://www.nls.uk/events/donald-dewar-lectures/2003>.

⁴ See on this Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013); Christopher Ballinger, *The House of Lords 1911-2011: A Century of Non-Reform* (Oxford: Hart Studies in Constitutional Law, 2012). The BBC website provides a useful timeline summary down to the final failure in August 2012: <http://www.bbc.co.uk/news/uk-politics-18613958>. I cannot be altogether unhappy with the outcome, as the gap left in the Government's legislative timetable by the failure of the House of Lords Bill permitted significant movement in relation to two measures recommended by the Law Commissions: enabling the Consumer Rights Bill 2014 (now the Consumer Rights Act 2015) to have more than 60 clauses and also giving the parliamentary time that was used to pass the Insurance Act 2015.

⁵ John Stuart Mill's phrase ‘tyranny of the majority’ occurs in *On Liberty*, introductory chapter.

WHY A SECOND CHAMBER?

David Steel saw the second chamber as existing solely to revise proposed legislation coming from the first chamber. That is undoubtedly an important second-chamber function, particularly in relation to government legislation. Consideration in a less politically pressurised environment, from a more politically detached and sometimes better informed perspective, free of party whips and leadership control of the individual career development of members, can often improve the quality of legislation from at least a technical point of view. It was the ‘light of experience’ which apparently let Lord Steel see the need for this in the Scottish Parliament in 2003. It is also notable that in all the debate about House of Lords reform since the election of the Blair Government in 1997, there was no serious proposal for a move to a single legislative chamber. Instead, as a Joint Committee of the two Houses of Parliament observed in a report in December 2002, the importance of an ‘opportunity for second thoughts’⁶ in the legislative system is fully accepted: “we find little support in the evidence we have examined for unicameralism in the United Kingdom”.⁷ This is also a reason why bicameralism is common in democracies throughout the English-speaking world – found, for example, in the USA, Australia, Canada, and (closest to Scotland) Ireland.⁸ In western Europe, while the Scandinavian countries by and large abolished their second chambers many years ago, Germany, France and Italy provide prominent examples of bicameral legislatures.

But deeper principles than simply revising legislation are at stake. David Hume stated them pithily, if in eighteenth-century mode, in his *Political Discourses*:

“All free governments must consist of two councils, a lesser and a greater, or, in other words, of a senate and a people. The people ... would want wisdom without the senate: the senate, without the people, would want honesty.”⁹

As modern democracy began to make headway in British government in the nineteenth century, however, the fundamentals were best stated by John Stuart Mill:

“A majority in a single assembly, when it has assumed a permanent character – when composed of the same persons habitually acting together, and always assured of victory in their own House – easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls, makes it desirable there should be two chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.”¹⁰

⁶ ‘Sober second thoughts’, in a famous phrase of a Canadian Prime Minister (Sir John A Macdonald), possibly reflecting somewhat adversely on the habitual state of members of the lower chamber.

⁷ House of Lords and House of Commons Joint Committee on House of Lords Reform, First Report, 9/10 December 2002, HL Paper 17, HC [7], para 10.

⁸ The New Zealand legislature has however been unicameral since 1950.

⁹ David Hume, ‘The idea of a perfect commonwealth’, in *Essays Moral, Political and Literary*, II (*Political Discourses*), xvi, 50 (1742). My attention was first drawn to this passage by the late Neil MacCormick’s Hume Lecture 2006, *The European Union and the Idea of a Perfect Commonwealth* (Edinburgh: Hume Occasional Paper No 68, David Hume Institute, 2006), in which he suggested that the principle was at least partly fulfilled in the European Union by the inter-locking roles of Council and Parliament.

¹⁰ Mill, *Considerations of Representative Government*, chapter 13.

The position of the SNP government since 2011 makes the need to guard against a majority ‘always assured of victory’ very clear; but in early 2003 I wrote that “a Labour-Liberal Democrat coalition seems highly likely to hold power in Scotland for the foreseeable future”;¹¹ and in fact it did so for four more years: eight years altogether. The need to guard against a potential ‘tyranny of a coalition majority’ in the Scottish Parliament is also very clear. The search for a structure with checks and balances on the exercise of power explains why many of the post-1989 eastern European states created bicameral legislatures for themselves (e.g. Poland, Romania, Czech Republic). The example of South Africa, which adopted a bicameral structure for the national legislature in its new Constitution of 1996, is also noteworthy here.

Meg Russell’s comparative study, published in 2000, suggested that second chambers exercise many functions apart from the review of legislation passed in the first chamber.¹² All may be linked to the concept of a check on the unbridled power of the majority. So legislation may be initiated, not just revised. Policy as well as legislation may be the subject of review and debate. A particularly important role is often played in the scrutiny of the delegated or subordinate legislation by which powers conferred on government by primary legislation are given executive effect. Many second chambers act as ‘guardians of the constitution’, with powers of veto over constitutional change, or at least to ensure a high degree of consensus supporting such change. Possibly of more direct relevance to the Scottish Parliament, the chamber’s review of legislation may have particular regard to constitutional aspects such as human rights. Public appointments, for example, to the judiciary, or as a public regulator, or to public bodies, may also come under the special scrutiny of the second chamber.

Russell also highlighted what she called the ‘territorial’ aspect of a second chamber’s task, ensuring that proper account is taken of the interests of the constituent parts of the State in the formulation of legislation and public policy. In federations, the second chamber often in some way represents the provinces or regions within that federation, rather than the population as a whole (e.g. USA, Australia, Canada, Germany, South Africa). These provinces or regions in turn have their own legislatures: in the USA and Australia these too are typically bicameral,¹³ while in Germany and Canada all are unicameral. This at least shows that bicameralism is not inconceivable for legislatures at sub-State level, an important point for the Scottish Parliament, albeit that the UK is not (as yet) a federal state. But the example of the UK (and of Ireland) shows further that bicameralism is not merely a concomitant of a federal structure of government. ‘Territorialism’ is also an important issue in House of Lords reform, and is not without significance in Scotland, where areas outside the Central Belt often fear domination of Government and Parliamentary attention by Glasgow and/or Edinburgh interests.

Key additional points for Scotland from the debate about Lords reform are that the democratically elected and representative first chamber is entitled to the final say where its view differs from that of the second, in particular with regard to the government’s manifesto legislation; and that government business should be considered in the second chamber without undue delay. A vital issue is the length of time for which the Lords may hold up the progress of legislation against the will of the Commons. The work of Lords committees such as those on the European Union and delegated

¹¹ MacQueen, ‘Case for a second chamber’ (above note 1), 49-50.

¹² Meg Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press for The Constitution Unit, University College London, 2000).

¹³ The exceptions are, respectively, Nebraska and Queensland (Russell, *Reforming the House of Lords*, 23).

legislation, as well as ones cutting across departmental boundaries, like that on Science and Technology, is also often highlighted as a success which must be maintained in any new dispensation at Westminster.

DISCHARGING SECOND CHAMBER ROLES IN THE SCOTTISH PARLIAMENT

The Scottish Parliament was carefully designed to be different from the Westminster model. The designers – initially the Scottish Constitutional Convention, then, later, the Consultative Steering Group and those who drew up the Scotland Act and piloted it through Westminster – deliberately rejected a bicameral structure. During the Westminster debates on the Scotland Bill in 1998, a second chamber was pressed upon the Government, in particular in the House of Lords, but without success. ‘Second chamber-type’ concerns were to be taken care of in other ways, which may be listed as follows:

- ***electoral system***: 72 of the Scottish Parliament’s 128 members are elected in traditional, ‘first-past-the-post’ ways to represent constituencies, while the remaining 56 are elected from regional lists, with the aim of ensuring that the overall balance of membership per party is proportionate to the popular vote for that party. This was supposed to make it very difficult, if not impossible, for one party to control the chamber, and led in the first two Parliaments to the Labour-Liberal Democrat coalition executive. A degree of cross-party consensus was thus required to pass legislation, including Scottish Government legislation. This held good for the SNP minority government of 2007-2011, but has not applied in the Parliament of 2011-2016.
- ***fixed term Parliaments***: a Parliament normally lasts for four years. It is possible for a Bill, once submitted, to remain under consideration through whatever remains of the four-year term; except possibly at the very end of that period, therefore, there ought to be ample opportunity for full consideration of all the detailed provisions of a Bill. The problem of an unchallengeable one-party majority in the Scottish Parliament from 2011 has been exacerbated by the one-year extension of the usual four-year term granted by Westminster to accommodate its own General Election set down for May 2015 as a result of the Fixed-term Parliaments Act 2011 (a constitutional reform at Westminster that *has* resulted from the Conservative-Liberal Democrat coalition government formed in 2010).
- ***Committee scrutiny system of legislation***: probably the most significant element in the way the Scottish Parliament seeks to fulfil a second chamber role in a unicameral setting. There are 17 committees altogether, including mandatory ones on European Union matters and on subordinate legislation paralleling the Lords committees on these subjects.¹⁴ Each committee must have between 5 and 15 members. Many of the non-mandatory or subject committees mirror roughly

¹⁴ The other mandatory committees of the 2011-2016 Parliament are Equal Opportunities; Finance; Public Audit; Public Petitions; Standards, Procedures and Public Appointments. The Subordinate Legislation committee became the Delegated Powers and Law Reform Committee in June 2013: see further 000 below.

the directorates and ministerial portfolios of the Scottish Government,¹⁵ but can nonetheless range across the boundaries in government structures. The composition of the committees and the overall appointment of their conveners are done with regard to party balance, but conveners need not necessarily come from the governing party or parties. MSPs may express an interest in joining a particular committee but regard is to be had to their qualifications and experience in thereafter appointing them. The committees are supposed to develop expertise in their subject area, carry out inquiries and take evidence, and initiate as well as scrutinise legislation. Since late 2012, and changes introduced by the Presiding Officer, Tricia Marwick MSP, committees meet on Tuesday, Wednesday and Thursday mornings when the Parliament is sitting, with full chamber proceedings taking place in the corresponding afternoons. Scrutiny of Bills begins in committee, leading to a Stage 1 report to, and debate in, the full Parliament on the general principles of the Bill. Stage 2 involves the relevant committee in the consideration and disposal of detailed amendments to the Bill, which can be proposed by any MSP. Stage 3 is the point at which the full Parliament considers the Bill in detail, but only amendments selected by the Presiding Officer can be taken at this stage. If difficulties arise, the Bill may be recommitted for further Stage 2 consideration; otherwise, Stage 3 concludes with a motion to pass the Bill. Under this system, however, the wording of an unamended Bill may never receive direct parliamentary scrutiny.

- ***limitations on legislative competence:*** the Scotland Act 1998 as amended by the Scotland Act 2012 limits the legislative competence of the Scottish Parliament. The limits will be further restricted by the Westminster legislation that will implement the Smith Commission proposals. From a ‘second chamber perspective’, the most important of the limits are the inability to amend such constitutional UK legislation as the Human Rights Act, the European Communities Act and the Scotland Act itself, along with the requirement to comply with the European Convention on Human Rights and European Union law. Various measures ensure compliance with these limitations. Government Bills must be introduced with a ministerial statement that they are within legislative competence, and the Presiding Officer must also state whether or not a Bill is within competence. Once a Bill has been passed by the Parliament, there is (as noted in the comments by Lord Steel with which we began) a four-week period during which it is considered for competence by the Advocate General, the Lord Advocate and the Attorney General. Any one of these officers may decide to refer the Bill to the Supreme Court of the United Kingdom (UKSC) for

¹⁵ The non-mandatory committees of the 2011-2016 Parliament are Devolution (Further Powers); Economy, Energy and Tourism; Education and Culture; Health and Sport; Infrastructure and Capital Investment; Justice (with a Justice Sub-Committee on Policing); Local Government and Regeneration; Rural Affairs, Climate Change and Environment; Welfare Reform. The Scottish Government Directorates are: Learning & Justice; Finance; Enterprise, Environment & Innovation; Health & Social Care; Communities; Strategy and External Affairs. Compare the Scottish Cabinet Secretaries: Finance, Constitution & Economy; Infrastructure, Investment & Cities; Fair Work, Skills & Training; Education & Lifelong Learning; Health, Wellbeing & Sport; Social Justice, Communities & Pensioners’ Rights; Justice; Rural Affairs, Food & Environment; Culture, Europe & External Affairs. Non-Cabinet Ministerial responsibilities are: Parliamentary Business; Business, Energy & Tourism; Transport & Islands; Youth & Women’s Employment; Children & Young People; Learning, Science & Scotland’s Languages; Local Government & Community Empowerment; Housing & Welfare; Public Health; Sport, Health Improvement & Mental Health; Community Safety & Legal Affairs; Environment, Climate Change & Land Reform; Europe & International Development; Lord Advocate.

a decision on whether it is within competence. Only once the four-week period has expired or, as the case may be, the UKSC has declared the Bill competent, may it be submitted for Royal Assent to become an Act. Even then, at any rate where the UKSC has not been involved, the Act may be challenged in the courts as beyond the powers of the Parliament. There have been a number of such challenges, mostly (but not all) unsuccessful.¹⁶ Finally, the Secretary of State for Scotland (now David Mundell MP) has power to prevent submission of a Bill for Royal Assent where he has reasonable grounds to believe that it is incompatible with international obligations or defence/national security interests, or would have an adverse effect in relation to reserved matters.

There are other means, albeit of a very different order, by which the Parliament has sought to make itself responsive to the concerns of society at large on a non-party basis.¹⁷ Perhaps the most obvious is its website and the relative ease with which electronic contact may be made with members. Cross-party working groups, provision for which is made in the MSP Code of Conduct, and which must be approved by the Standards Committee, have been established in large numbers (49), sometimes dealing with very specific issues (e.g. Adult Survivors of Childhood Sexual Abuse), while others have a much more general character (e.g. Rural Policy).¹⁸ The Public Petitions Committee had received 1263 petitions by the end of May 2009,¹⁹ while the continuous numbering system for petitions on the Committee's webpage had reached 1575 when checked on 21 July 2015.²⁰ Given that nearly 600 of these petitions had been submitted by the end of 2002, when the previous version of this paper was researched, it is evident that the public appetite for petitioning the Parliament has been in fairly significant decline for some time.

In contrast, there has been progress in the procedures for implementation of the legislative recommendations of the independent Scottish Law Commission, which proceeds by expert consultation, report and draft legislation available for public scrutiny and comment before submission to government. It generally lies with government to decide whether or not to implement, although an MSP may pick up a report as a Members Bill. The previous version of this paper noted that “disappointingly few of [the Commission's] reports since devolution have been implemented; apart from land reform”.²¹ Significant reform of the law of incapable adults and, more recently, of

¹⁶ Unsuccessful challenges include *A v Scottish Ministers* 2000 SC (PC) 63; *Adams v Scottish Ministers* 2004 SC 665; *Whaley v Lord Advocate* 2004 SC 78; *Friend v Lord Advocate* 2006 SC 121; *Axa General Insurance v Lord Advocate* 2012 SC (UKSC) 122; *Imperial Tobacco Ltd, Petitioner* 2013 SC (UKSC) 153. But see *Salvesen v Riddells and Lord Advocate* 2013 SC (UKSC) 153, and note that *Scotch Whisky Association v Lord Advocate* [2014] CSIH 38 (the alcohol pricing case) has been referred to the Court of Justice of the European Union for an advisory opinion.

¹⁷ The Scottish Civic Forum, a membership organisation for religious, business, voluntary and professional bodies, community councils and trades unions funded by the Scottish Executive, which aimed to build links between the Executive, Parliament and civic society with a view to influencing the shaping of government policies, ceased to be funded in 2006 and has not been replaced.

¹⁸ See generally <http://www.scottish.parliament.uk/msps/cross-party-groups.aspx>. There is still at least nominally a group on Cuba, but it does not seem to have met since 14 December 2011.

¹⁹ The Committee reported on some dissatisfaction with the public petitions process in May 2009 and proposed some consequential improvements in its procedures:

<http://archive.scottish.parliament.uk/s3/committees/petitions/reports-09/pur09-03.htm>.

²⁰ See <http://www.scottish.parliament.uk/gettinginvolved/petitions/ViewPetitions.aspx?page=0>.

²¹ For implementation of land reform reports see the Abolition of Feudal Tenure etc (Scotland) Act 2000, the Leasehold Casualties (Scotland) Act 2001, the Title Conditions (Scotland) Act 2003, the Tenements (Scotland) Act 2004, the Long Leases (Scotland) Act 2012 and the Land Registration (Scotland) Act 2012.

criminal law by the Scottish Parliament has also resulted from Commission reports.²² But reports on a number of other matters of social and economic significance still await their fulfilment.²³ On 28 May 2013 the Scottish Parliament decided to accept recommendations for changes to its Standing Orders to allow Commission Bills where the need for reform is widely agreed, but no major or contentious political or financial issues arise, to be referred to the Subordinate Legislation Committee, which was accordingly to be re-named as the Delegated Powers and Law Reform Committee (DPLRC).²⁴ The Bills would come forward as Government Bills; but otherwise they would follow the usual procedures for legislation in the Scottish Parliament.²⁵ The first such measure, the Legal Writings (Counterparts and Delivery) (Scotland) Bill, completed Stage 3 of its progress to the statute book on 24 February 2015, received Royal Assent on the auspicious date of 1 April 2015, and came into force on 1 July 2015. A highly technical measure, the anticipation is that it will significantly facilitate the completion of business and other formal documents in Scotland by the use of information technology; the implementation of the Commission's report on the matter was indeed widely supported in the legal and business communities.²⁶

It had been previously suggested that the subject-matter of Law Commission Bills would often be ideal for initiation in a second chamber. Although the pilot experience of the Legal Writings Bill in the DPLRC was a positive one, it remains to be seen whether this will provide a long-term and complete solution to the problem.²⁷ In the present context of discussion, the approach to the same question now in place at Westminster provides an interesting contrast. A Special Public Bill procedure for uncontroversial Law Commission Bills, initiated by the introduction of a Government Bill in the House of Lords, was introduced in 2009.²⁸ The Second Reading, the detailed scrutiny of the Bill, takes place in a House of Lords committee and in a committee room, not on the floor of the House. Like the Scottish procedure, it is not a 'fast track'. Second Reading takes as long as it would otherwise take; scrutiny in Second Reading Committee may even be more rigorous because the nature of a House of Lords committee can lend itself to expert probing of technical issues. A Bill going through this procedure cannot be a vehicle for a piece of non-Law Commission policy, and it must be 'uncontroversial' – an undefined term. Must the Bill must be so boring that no-one cares? Does it mean there can be no amendments? From experience, the answer to both questions is clearly No. What matters, therefore, is that the Bill must not be *politically* controversial. Support and opposition must not fall along party lines. And it seems that where a Bill is dealing with English law, it must not seek to impact also upon

²² See the Adults with Incapacity (Scotland) Act 2001, the Sexual Offences (Scotland) Act 2009, the Criminal Justice and Licensing (Scotland) Act 2010, and the Double Jeopardy (Scotland) Act 2011.

²³ Commission reports and their implementation (or not) can be tracked on the Commission website: <http://www.scotlawcom.gov.uk/publications/>.

²⁴ See the Official Report for 28 May 2013, cols 20374–79 (<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=8934&mode=pdf>).

²⁵ For a general description of the discussions which led up to the announcement of the new procedure see Malcolm McMillan, 'Law reform in the Scottish Parliament: a new process – a new era?' *Scottish Parliamentary Review* 3 (2014) 95.

²⁶ See further Hector MacQueen, Charles Garland and Lauren Smith, 'Law reform in the Scottish Parliament', *Scottish Parliamentary Review* (forthcoming).

²⁷ A second Scottish Law Commission Bill (the Succession (Scotland) Bill) was introduced in June 2015.

²⁸ See further Elizabeth Cooke and Hector MacQueen, 'Law reform in a political environment: the work of the Law Commissions', in David Feldman (ed), *Law in Politics, Politics in Law* (Oxford: Hart Studies in Constitutional Law, 2013), chapter 9.

Scots law without any prior consultation.²⁹ In fact, of the seven Bills (just about one a year) that have gone through since 2009, three apply throughout the United Kingdom and are the product of joint reports by the English and the Scottish Law Commissions (all on the subject of insurance). The Special Procedure is also available for purely Scottish Law Commission Bills, however, and so far one such Bill has got through: the Partnerships (Prosecution) (Scotland) Act 2013.³⁰

While it must be acknowledged that much has been done to address the concerns which might otherwise occupy a Scottish second chamber, nonetheless it cannot be contended that these are yet adequate or sufficiently strong. 230 Scottish Acts had been passed by the end of June 2015, while 27 Bills were in progress. The burden of drafting all this plus Scottish subordinate legislation now falls upon six Parliamentary Counsel and their twelve assistants. It is no criticism of their work to say that it would not be surprising to find imperfections in the results, even after parliamentary scrutiny. The process of scrutiny lacks a dimension external to or independent of the elective chamber, making genuinely self-critical ‘second thought’ or ‘second opinion’ processes less likely. In any event, a very large amount of responsibility for both initial and subsequent scrutiny is being placed upon the same, relatively few and variably experienced shoulders. Vulnerability exists, in Mill’s words again, “to the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult”.³¹ For Mill, otherwise sceptical on the subject, this was “the consideration which tells most ... in favour of two Chambers”.³²

The post-Parliamentary review process for legislative competence takes place out of the public eye unless the Bill is referred to the UKSC, and does not appear to be subject to any democratic scrutiny en route. The constitutional guardians are Law Officers and UK ministers, not all of whom are necessarily elected but who do all owe their positions to government. Finally, although lines of communication are open between civic society and the citizen, on the one hand, and the Parliament and the Government, on the other, the extent to which the latter takes the views of the former into account is not at all transparent, and some of the lines of communication have collapsed or are in an apparently failing state.

FORMING A SECOND CHAMBER

The debate about Lords reform has concentrated more on what sort of body may most effectively and legitimately carry out the roles of the second chamber than on the roles themselves. If a second chamber is to be established in the Scottish Parliament, then these issues must also be addressed here. Once again, experiences in other countries are instructive. Meg Russell suggests the following points as ways in which the second

²⁹ The Inheritance and Trustees’ Powers Bill 2013 as originally laid before Parliament contained a provision (*not* recommended by the Law Commission of England & Wales in the relevant report) that would have allowed English courts to undo the outcomes of Scottish succession law in certain circumstances. The provision was withdrawn only after fierce opposition from Scottish interests.

³⁰ The other Acts are (England & Wales-only ones asterisked): *Perpetuities and Accumulations Act 2009; Third Parties (Rights Against Insurers) Act 2010; Consumer Insurance (Disclosure and Representation) Act 2012; *Trusts (Capital and Income) Act 2013; *Inheritance and Trustees’ Powers Act 2014; Insurance Act 2015.

³¹ *Considerations of Representative Government*, chapter 13.

³² *Ibid.*

chamber becomes sufficiently different from and independent of the first; all seem potentially applicable, or at least worthy of discussion, in the Scottish context:³³

- The second chamber should be considerably smaller than the first;
- members should serve for longer terms than those of the first chamber but need not be full-time;
- the membership should be ‘rolling’ (that is, at intervals, some part of the membership should retire or be subject to re-election/reappointment);
- a minimum age for members, perhaps between 30 and 40, may be desirable to ensure depth of experience;³⁴
- no party should have overall control of the chamber (this may mean a need for a sufficient number of independent, non-party members, or allowing small parties to hold a balance of power);
- government ministers should not be appointable from the second chamber;
- a ‘territorial’ role may require an equal number of seats for each of the territories represented;
- members of the second chamber probably should not have constituency responsibilities.

Russell also explores what has become the major stumbling block in the House of Lords reform, namely how the membership is determined. Above all, perhaps, the second chamber requires legitimacy: that is, when it differs from the popularly elected first chamber and government, the entitlement of its views to be given weight in the democratic process should be clear. To have this, the chamber must be broadly representative, going beyond party to cover dimensions such as the regional, ethnic, gender, religious, vocational, professional and cultural. However, a range of expertise should also be readily available within the chamber, giving it authority as well as perspectives fresh and independent, not only of the first chamber, but also of government.

Is this combination of legitimacy and representativeness with expertise best achieved by way of popular election (and if so what form of election?), appointment of members (and if so by whom?), or some combination of these? This has yet to be decided for the House of Lords, although a combination of election and appointment seems the likeliest outcome. While elections confer clear political legitimacy, they also give campaign advantages to party participants and may entail party control of the

³³ Russell, *Reforming the House of Lords* (above, note 12), chapters 12-14.

³⁴ How far this may still apply in a Scotland where the voting age was dropped to 16 in the independence referendum of September 2014 and will probably be similarly lowered for Scottish Parliamentary and local government elections once the Scotland Bill 2015 is enacted and comes into force. It is also worth noting in this context that Mhairi Black was 20 years old when elected MP for Paisley and Renfrewshire South in May 2015.

resulting chamber. This can be offset by an appropriate appointment system. If the House were to be wholly appointed, however, it would suffer from the same difficulties as its old hereditary element, lacking the legitimacy required to challenge the Commons effectively.

Never the less, Lord Steel would apparently prefer a revising chamber of the Scottish Parliament to be wholly appointed, in the manner of the ‘people’s peers’ first created for the House of Lords in April 2001. That process involves nomination from members of the public and their consideration by the House of Lords Appointments Commission, an independent body set up by the Prime Minister in May 2000 to make recommendations on the appointment of non-party political peers.³⁵ This cannot be said to have been a resounding popular success, or even well-known now to the public in general, and is assuredly not the best precedent to invoke at this stage.³⁶ But the idea of nominations from the public, including self-nominations, has its attractions as a half-way point towards the public participation otherwise achievable only through electoral processes.

Natural scepticism about sparing the great and good of the second chamber the rough and tumble of an electoral process to get there should however be tempered by recognition of the need to achieve permanent balance and expertise in the chamber. On the other hand, the public’s ‘election fatigue’, sometimes mentioned as a factor against electing the House of Lords with especial reference to declining voter turn-out generally, should probably not be accorded undue weight in the discussion, especially if the second chamber’s term of office was to be rather longer than that of the first chamber as part of ensuring the former’s independence of the latter.

Against a background of what he describes as an emerging consensus for upper-house reform at Westminster whereby it would be largely (say 80%) elected, Iain McLean, a Scot who is Professor of Politics of Oxford, has suggested the following points as a basis for the elections and the appointments:

- election for a fixed non-renewable term of three parliaments;
- election by thirds at general elections;
- election in fairly large districts such as those used for European Parliament elections;
- members ineligible to move directly between the upper and the lower houses;
- appointments to be by a non-partisan, probably statutory, commission working to published criteria and in accordance with general public appointment standards;

³⁵ See its website, <http://lordsappointments.independent.gov.uk/>.

³⁶ See e.g. <http://www.theguardian.com/politics/shortcuts/2014/dec/07/nominated-myself-house-of-lords-peoples-peer> (7 December 2014); <http://www.independent.co.uk/news/uk/politics/now-you-see-them--peoples-peers-less-visible-than-hoped-1634742.html> (1 March 2009); <http://www.telegraph.co.uk/news/uknews/1518964/Peoples-peers-are-least-likely-to-be-seen-in-the-Lords.html> (21 May 2006); <http://www.dailymail.co.uk/news/article-41559/Sick-joke-Peoples-Peers-shun-people.html> (27 April 2001).

- all members subject to the same ethics rules as apply to public bodies generally.³⁷

Changing what would need to be changed in the Scottish context, much here could readily be taken on board.

The range of possibilities for a Scottish second chamber cannot be fully canvassed in a short paper like this, and only a few further comments are offered. Those who worry about the extra cost of having a second chamber might be mollified if existing individuals and institutions were to some extent redeployed in the second chamber role. Might the 56 regional list MSPs, detached from constituency responsibilities, form a quasi second chamber?³⁸ The problem is the political imbalance resulting from the fact that their composition is meant to redress the failure of the ‘first-past-the-post’ electoral system to produce outcomes proportionate to the overall distribution of votes. Thus, for example, there are currently 22 Labour list MSPs by comparison with 16 for the SNP and 12 for the Conservatives, as against a first-past-the-post count of 16, 48 and 3 respectively. Might the temptation to combine to derail or dislocate the government programme be too much for parties otherwise in opposition? A similar objection of political imbalance attaches to the idea of making the 59 Scottish Westminster MPs into an upper chamber for Holyrood, especially when as now 56 of them come from the party that is already in government in the latter parliament. The Scottish Members of the European Parliament are probably too few in number (six) and almost certainly too busy to take on the additional burden of being a domestic second chamber. But these points should not rule out the possibility of including representative MPs and MEPs in the upper chamber, which could usefully highlight the integration of the devolved system with UK and European Union levels of government. There may however be concerns about individuals having double functions in the structures of representation.

Might a fully reformed House of Lords take on second chamber responsibilities for the devolved institutions as well as at Westminster? The attraction would again be an increase in the transparency of interaction between UK and devolved institutions and, possibly, a lessening of ignorance on each side of the system, while the ‘double function’ objection might be a little less strong. The clear objection, however, would be the involvement of a UK institution in devolved matters, and some way would have to be found to give the House, or that part of it assigned to perform the function, a sufficiently Scottish character to have legitimacy in the eyes of, not only the Scottish Government and Parliament, but also the Scottish electorate. Meeting in Scotland to discharge the task would, one suspects, not be enough.³⁹

³⁷ Iain McLean, *What's Wrong with the British Constitution?* (Oxford: Oxford University Press, 2010), chapter 11 (‘Unelected Houses’), p 250.

³⁸ The unicameral Norwegian Parliament splits itself into two groups of members to perform the respective functions of first and second chambers.

³⁹ There may however be much to be said for representation from the devolved parliaments and assemblies in any future reformed House of Lords, as long ago recommended by Lord Crowther-Hunt and Sir Alan Peacock in their Memorandum of Dissent in volume 2 of the Report of the Royal (Kilbrandon) Commission on the Constitution 1969-1973 (Cmnd 5460-I, October 1973). Note here also the suggestion made to the Joint Committee on House of Lords Reform (Appendix 3, First Report, December 2002) by the Presiding Officers of the devolved institutions (each already a Lord) that their successors should be *ex officio* members of the House of Lords, to facilitate interchange between them, keep them up-to-date on Westminster developments, and inform the Lords on matters of specific interest to the devolved regions.

It seems a relatively easy matter to provide a Scottish second chamber with a territorial character, should that be thought helpful to counteract fears of Edinburgh/Glasgow domination at Holyrood. A basis of division already exists in the regions used for the regional lists in the Scottish Parliament (i.e. Highlands and Islands, North-East Scotland, Mid-Scotland and Fife, West Scotland, Glasgow, Central Scotland, Lothians, and South Scotland). More difficult would be the representation of civic Scotland: the Scottish Civic Forum claimed over 350 members, and clearly not all of these could also be represented in a second chamber. Nor did the Forum itself necessarily cover all those bodies which might consider themselves civically representative, and how the concept of civic Scotland might take sufficient account of factors such as gender, ethnicity and religion is also unclear.

CONCLUSION

The case for the *functions* often performed by second chambers as a necessary element in a democratic polity is really uncontroversial. The question of whether a second chamber is *needed* to perform them is not. In Scotland, the answer should depend upon whether our presently unicameral Parliament is seen to have carried them out well, along with all its other functions as an arena of democratic politics and government. That clearly deserves further analysis as part of the process of reviewing how a still youthful institution has performed in relation to the expectations held of it.

If a second chamber is thought to be required, there is plenty of material to hand from which a suitable structure might be fashioned. The critical issues will probably be the manner of appointment and the extent of the powers which the chamber will have in relation to the rest of the Parliament and the Government. The matter canvassed in this paper suggests that the chamber should -

- be no larger than 50 persons, of which perhaps half or more might be elected in some way or other, and include territorial or regional representation;
- not necessarily be full-time;
- not be controlled or controllable by any party or combination of parties;
- have the power to require reconsideration, but, generally, not to prevent the passage, of legislation from the other chamber;
- have other functions, including the initiation of non-contentious legislation such as non-political law reform proposals, and constitutional and other public interest scrutiny of legislation and other public actions and decision-making
- have as an important consideration relations between the Parliament and other institutions of government in the UK and the European Union.

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